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Statutory Reemployment Rights of World War II Veterans

He marked on the left side of the sheet the autos going south. Those on the right side indicated autos passing his window in the opposite direction. The Justice of the Peace announced to the young barristers with some pride that on a busy Decoration Day he had counted 1200 cars.

The moral of the cobbler-Justice of the Peace is sufficiently clear and requires no labored development. Cobbler shops and red flannel shirts are typically American but we would hardly argue for the extension of this form of administering justice in complicated cases. As a matter of fact the jurisdiction of the non-lawyer justice is disappearing for reasons many and diverse. Contrariwise the presence of a robed justice in a well appointed courtroom does not itself insure the correct decision or true administration of justice. Thus far we go along with the argument of Judge Frank. Even so, a black robe rather than a red shirt, has its advantages in symbolizing the dignity and the majesty of the law and the conscience of the state speaking through its judiciary.

The learned Judge has not demonstrated that the abolition of the judicial robe would better the judicial process in any substantial degree. On the other hand, there is warrant for the belief that American traditions and the continuity of our institutions are inspired and perpetuated by representative symbols. Our flag, which Thorstein Veblen once summed up as a piece of woolen bunting, has assumed a new and glorious texture during the war years. The uniforms of our Armed Forces also spell out untold sacrifice and suffering in our behalf. Symbolism has been partially in eclipse, it is true, in recent years. As late as 1937, Thurman Arnold in his *Folklore of Capitalism* dismissed the symbol of "cruel German" as a mere bogey man invented to frighten American adults.[13]

Lacking good reasons for its removal and finding adequate reasons for its long tradition in the law, we enter this wholly inadequate plea for the continuance of the *Cult of the Robe.*

STATUTORY REEMPLOYMENT RIGHTS OF WORLD WAR II VETERANS

I

The accelerated demobilization of American military forces since the cessation of actual fighting has inevitably aroused public interest in the legislative provisions which have been enacted to facilitate the serviceman's adjustment in a post-war economy. A minimum of misunderstanding has been manifested in the interpretation of some of the veteran's legislation, such as the so-called G.I. Bill of Rights.[1] But where the interests of third parties are adversely affected, directly or indirectly, by the provisions enacted for the protection

13. ARNOLD, THE FOLKLORE OF CAPITALISM (1937) 30.

1. 58 STAT. 284 (1944), 38 U. S. C. A. § 693 (1944).

of the veteran, the application of the law has often resulted in misunderstanding fed by uncertainty and conflicting opinion. Such misunderstanding has threatened to undermine the effectiveness of the reemployment provisions of Section 8 of the Selective Training and Service Act of 1940, as amended.[2]

Section 8 is brief and fairly compact. A reading of its provisions immediately manifests its purpose to guarantee to the qualified veteran the job which he left to enter the armed forces—not just *a* job, but the same job or one substantially its equivalent. Section 8 fills the void which veterans of World War I encountered upon their discharge from service. The criticism which has been leveled recently at Section 8 suggests that its supposed deficiency lies not so much in a failure to provide adequately for the veteran as in the absence of provisions protecting third parties from a disturbance by the returning veterans of the *status quo*.

With the present dearth of judicial interpretation, wherein must lie the final arbitration of the conflicting interests now besetting Section 8, an uninhibited variety of *dicta* has been released by administrative agencies, labor unions, veterans' organizations, and others, until today the responsible employer is confronted with indecision and uncertainty in seeking to comply with the law. Perhaps the most authoritative non-judicial voice which has been raised in this connection is that of the Director of Selective Service.[3] The official pronouncements of the Director of Selective Service in reference to the reemployment provisions of the Act are to be found in local board memoranda and policy guides. Generally, administrative regulations authorized by statute have the force of law where they are issued within the scope of that law and are reasonable and consistent therewith.[4] While the Director has from time to time issued appropriate regulations dealing with the classification and induction of registrants, his statements concerning his agency's policy in reemployment have been generally confined to local board "memoranda" and

2. 54 STAT. 885 (1940), 50 U. S. C. A. APP. § 308 (1940).

3. By § 10 (a) of the Selective Training and Service Act of 1940 as amended, the President is authorized to prescribe the necessary rules and regulations to carry out the provisions of the Act; by § 10 (b) he is authorized to delegate "to the Director of Selective Service only" any authority vested in him under the Act that vested in him by excepting § 9 which contains the so-called "draft of industry" provisions. In addition § 8 (g) of the Act provides that the Director of Selective Service "shall establish a Personnel Division with adequate facilities to render aid in the replacement in their former positions of, or in securing positions for, members of the reserve components of the land and naval forces of the United States who have satisfactorily completed any period of active duty, and persons who have satisfactorily completed any period of their training and service under the Act."

4. United States v. Grimaud, 220 U. S. 506 (1910); Haas v. Henkel, 216 U. S. 462 (1910); International Railway Co. v. Davidson, 257 U. S. 506, 514 (1922). An administrative agency, however, obviously cannot issue such regulations as have the effect of altering or extending a statute or modifying its provisions. Morrill v. Jones, 106 U. S. 466 (1882); Campbell v. Galeno Chemical Co., 281 U. S. 599, 610 (1930); Miller v. United States, 294 U. S. 435 (1935).

bulletins for the guidance of local Selective Service agents. The reason for this would appear to lie in the fact that the Act does not specifically give the Director the responsibility of carrying out the reemployment provisions of the Act by issuance to private employers of orders directing compliance. Rather, the enforcement of the rights provided for is specifically turned over to the courts, and in such enforcement proceedings the veteran is entitled to be represented by the proper United States Attorney and not by the Director of Selective Service. The Director himself has admitted that he is without authority to issue binding interpretations of Section 8 and that only the federal courts are specifically clothed with authority to interpret and enforce its provisions.[5] While recognizing the exclusive function of Congress to legislate on the subject of national military training and all rights and obligatons in connection therewith,[6] and the exclusive power of the courts to interpret such legislation,[7] the Director of Selective Service has embodied his agency's views on Section 8 in several releases and memoranda which have played an important role in the development of this provision. While the interpretations of Selective Service do not bear the force of law, they cannot be disregarded in any discussion of the statutory provisions affected. Selective Service has frequently asserted its duty, in conjunction with administering the Act, to interpret its application until the courts pass upon any particular issue.[8] At least one District Court has recognized the value of the interpretations of Selective Service in arriving at a decision. In the recent case of *Tipper v. Northern Pacific Ry.*[9] the court stated in part:

"In construing the Act as it now exists and applies to this particular case, this court does give great weight and consideration to the regulations of the Director of Selective Service. While not being able to look to them as a precedent, never-

5. — F. Supp. — (W. D. Wash. 1945), 16 LAB. REL. REP. 213. In his most recent summation of Selective Service Policy toward the reemployment provisions of § 8, the Director of Selective Service was careful to refer to his statements as, "determinations and interpretations." Handbook—Veterans Assistance Program, National Headquarters, Selective Service System, (1945) § 301.1 (b).

6. "It is well to keep in mind that the statutory reemployment rights of veterans are established by the Congress in the exercise of its war powers and its power to raise armies and support navies and are not estabilshed by the executive branch of the Government or by industry, agriculture, or labor. Selective Service Publication of April, 1945, 1 Prentice-Hall Labor Service 2194; Release S-64, National Headquarters, Selective Service System, May 9, 1945.

7. *Ibid.* See also Local Board Memorandum No. 190-A, National Headquarters, Selective Service System, as issued May 20, 1944.

8. "National Headquarters of the Selective Service System prepares the general plans and makes all decisions in interpreting the application of the Act. This is necessary in order to secure uniformity of interpretation, since many organizations affected are interstate and a lack of uniformity in the Act would make it unworkable." Selective Service Reemployment Bulletin No. 1, issued September 29, 1943. See also Selective Service Publication of April, 1945, 1 Prentice-Hall Labor Service 2194; Release S-64, National Headquarters, Selective Service System, May 9, 1945.

9. — F. Supp. — (W. D. Wash. 1945), 17 LAB. REL. REP. 147.

theless, if it can be read into them or out of them just exactly what the intent was when issued, why certainly that intent should be given expression. . . ."

Another District Court has followed reasoning similar to that announced by Selective Service in the face of strong opposition in a case in which that agency had taken more than a passive interest.[10] For these reasons the viewpoints announced by the Director of Selective Service in connection with Section 8, while lacking in the binding force of judicial interpretations, are of sufficient significance to give them careful attention in this analysis.[11]

II

"Sec. 8 (a). Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained."

Who is eligible for the benefits stipulated in Section 8? The original language of Section 8 (a) confining the benefits to "any person *inducted*" into the armed forces has been broadened to include "*any* person who, subsequent to May 1, 1940 . . . shall have *entered* upon active military or naval service in the land or naval forces of the United States."[12] This provision is sufficiently broad to cover volunteers as well as inductees, officers and enlisted men, and servicewomen. Right to reemployment in their former positions has also been extended to members of the Merchant Marine.[13] Persons to whom Selective Service has declared the benefits of Section 8 to be inapplicable include members of the Coast Guard Auxiliary, conscientious objectors, and persons in the employ of any state or political subdivision thereof.[14]

In order to be eligible for restoration to his former position, the veteran must produce a certificate showing that, in the judgment of those in authority over him, he has satisfactorily completed his period of active duty or period

10. Fishgold v. Sullivan Dry Dock & Repair Corp., 62 F. Supp. 25 (E. D. N. Y. 1945).

11. Many of the policy guides issued by Selective Service have been recently modified or reaffirmed by consolidation in a publication entitled "Handbook—Veterans' Assistance Program" released in September, 1945, for the benefit of reemployment committeemen attached to local draft boards. Since this handbook constitutes the most recent official pronouncements of Selective Service in regard to veterans' reemployment rights, and since its publication casts doubt upon the authoritative value of many of that agency's earlier releases, authority for Selective Service policy will be confined almost wholly in this writing to this handbook, which is hereinafter cited as "Handbook—Veteran's Assistance Program."

12. SERVICE EXTENSION ACT OF 1941, 55 STAT. 627, 50 U. S. C. A. APP. § 357 (1941).

13. 57 STAT. 162, 50 U. S. C. A. APP. § 1472 (1943). As to the length of time allowed members of the Merchant Marine to apply for reinstatement to their former positions, see note 29 *infra*.

14. Local Board Memorandum No. 190-A, National Headquarters, Selective Service System, as issued May 20, 1944.

of training and service. The form of the required certificate does not otherwise appear to be material. A former member of the Merchant Marine in order to be eligible for reemployment rights must have a certificate issued in accordance with the rules and regulations of the Administrator of the War Shipping Administration evidencing that he has completed a period of substantially continuous service in the Merchant Marine.[15]

III

". . . (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position in the employ of any employer and who (1) receives such certificate. . . ."

While the absence of extensive judicial interpretation of Section 8 prevents any finality of conclusion, it seems clear that it does not, and was never intended to, apply to any person who did not terminate his employment for the express purpose of entering the armed forces immediately or within a reasonable time thereafter. In this connection the Director of Selective Service has stated:

"The purpose, object, motive and primary cause in leaving the employment must have been the entrance into active military or naval service. If the veteran had quit his job for reasons unrelated to military service and then later entered the armed forces, he is not entitled to the statutory rights of reemployment."[16]

At least one court has dismissed a veteran's suit for damages under Section 8 because he failed to prove to the court's satisfaction that he was in the employ of the defendant at the time of his induction.[17] In another instance a Michigan court has held that where an employee was notified by his draft board that he had been selected for military service and voluntarily quit his employment to await induction five days later, he thereby severed his employment relationship for all purposes arising under Section 8 and could not be considered in the employment of defendant when he died one day before his induction.[18]

The statute does not qualify or limit the type of position protected by Section 8 other than that it must not be "temporary." What constitutes a "position other than temporary" is one of the indeterminables which judicial consideration alone can ascertain. The issues which could arise under conflicting constructions of the term "temporary position" appear legion. It would be idle to speculate upon the gamut of problems which will undoubtedly appear when discharged veterans compete with their own replacements for the same job; former employees seek to return to jobs which are of a seasonal or irregular tenure; when apprentices, probationary workers, and part-time employees apply for their old positions under post-war conditions.

15. Handbook—Veterans' Assistance Program § 301.3 (b).

16. *Id.* at § 301.6.

17. United States *ex rel.* Stanley v. Wimbish, — F. Supp. — (W. D. Wash. 1945), 16 LAB. REL. REP. 804.

18. Murphy v. Chrysler Corp., 306 Mich. 610, 11 N. W. (2d) 261 (1943).

The right of a replacement employee to reemployment in a position from which both he and the original incumbent were inducted into the military service appears to have been examined in only one court decision to date. In *Salzman v. London Coat of Boston, Inc.*,[19] plaintiff was originally hired to replace defendant's New York sales representative, who had been inducted into the Army of the United States. It does not appear that plaintiff knew when he first applied for the position that he was to replace an inductee, but the court was satisfied that at the time he signed his contract of employment he knew that his predecessor was on temporary leave from the company for military service and that plaintiff was to fill the job in his absence. Plaintiff was subsequently inducted and upon his honorable discharge and application for reinstatement, he was refused employment in that particular capacity on the grounds that defendant had never had more than one sales position in its New York office and that that position had already been filled by plaintiff's predecessor upon the latter's release from service. The court sustained the employer, finding that its primary obligation was toward the predecessor employee to whom the position rightfully belonged and that, as a matter of law, plaintiff was a temporary employee not entitled to the benefits of Section 8.

The Director of Selective Service has expanded his interpretation of a "position other than temporary" beyond the general rule previously laid down that, "one who is employed to fill the place made vacant by a person entering service occupies a temporary status and has no reemployment rights even though he subsequently enters service."[20] Under current Selective Service policy, more reliance appears to be placed upon the "character of the employment relationship." Whether or not a worker was part-time or probationary, trainee, apprentice or journeyman, or whether he replaced another inductee prior to his own induction, the temporary nature of his job should not depend upon the particular assignment involved, but rather upon the facts and circumstances relating to the employment relationship."[21] Presumably, the Director refers to the *intention* of the parties to the employment contract, whether express or implied, and such a view appears to be a reasonable one. The apparent weakness in attempting to set arbitrary standards in order to determine what is temporary and what is not, is demonstrated in a gratuitous opinion rendered by the Solicitor of the Department of Labor on Section 8. He has interpreted a temporary position as being one in which a person was *expressly informed when hired* that he was hired as a temporary employee;

19. — F. Supp. — (W. D. Wash. 1945), 17 LAB. REL. REP. 149.

20. Local Board Memorandum No. 190-A, National Headquarters, Selective Service System, as issued May 20, 1944. However, it should be noted that this general rule was qualified to some extent by reference to the facts and circumstances of each individual case, including that of the employment relationship.

21. Handbook—Veterans' Assistance Program §§ 303.2, 303.3. The Director of Selective Service found significance in the use of the phrase "position other than temporary" by Congress instead of "permanent," which he has construed as a more limited term.

and even where such employee was informed of the temporary nature of his job, he would be entitled to return to that job upon release if he had acquired any seniority rights under the seniority system existing in the plant before his entry into the armed forces, or if a similar position existed when he applied for reinstatement.[22] In other words, the actual intention of the parties would be disregarded if it was not *expressly* stated at the time of hiring, and even if it was so stipulated, presumably such intention would fall before the inexorable sanctity of the individual's seniority rights, whether accrued over a period of eight years or eight hours.

Of course, even if the temporary status of a particular employee seems clear, the employer is not relieved of statutory obligations which he may owe that employee other than those imposed by Section 8. Where a temporary employee was found to have been discriminatorily discharged for union membership in violation of Section 8 (3) of the National Labor Relations Act[23] and was inducted into the Army six weeks thereafter, the National Labor Relations Board ordered the employer to reinstate the employee in his old position upon his application within forty days of his release from military service. Forty days at that time was also the period required by Section 8 of the Selective Training and Service Act, as amended[24] within which an honorably discharged veteran must apply for reemployment. The reinstatement ordered by the Board was to be to his "former or a substantially equivalent position, or . . . placement upon a preferential list . . . without prejudice to his seniority or other rights and privileges."[25] The Board's decision has been sustained by the Circuit Court of Appeals.[26] Since the decision arises from an interpretation of legislation other than the Selective Training and Service Act, it naturally is not concerned with the reemployment requirements of Section 8 of that Act, including the necessity for an honorable discharge and the physical and mental capacity of the employee to fill the job. It would therefore appear to create an exception to the provision of Section 8 that only employees *other than temporary employees* are entitled to reemployment upon discharge from the armed forces.

IV

". . . (2) is still qualified to perform the duties of such position. . . ."

The ability of the discharged veteran to fill his former job is necessarily a question of fact, not amenable to any general rule. It may be expected that

22. Memorandum from Douglas B. Maggs, Solicitor of the United States Department of Labor, to Howard T. Colvin, Acting Director of the United States Conciliation Service, May 8, 1945.

23. 49 STAT. 452, 29 U. S. C. A. § 158 (1935).

24. 54 STAT. 885, 50 U. S. C. A. APP. § 308 (1944).

25. *In re* Humble Oil & Refining Co., 48 N. L. R. B. 1118 (1943).

26. Humble Oil & Refining Co. v. National Labor Relations Board, 140 F. (2d) 777 (C. C. A. 5th, 1944); National Labor Relations Board v. Revlon Products Corp., 144 F. (2d) 68 (C. C. A. 2d, 1944).

an employer's claim that the employee is no longer physically or mentally capable of filling his old job will be scrutinized with care, and in the close case the veteran will be favored.[27] His rights under Section 8 should not be prejudiced merely because he has been medically discharged or is in a less fit physical condition than when he departed for military service if he is still qualified to perform the duties required by his job at that time. In *Grasso v. Charles M. Crowhurst*[28] it was held that where plaintiff suffered from congenital flat feet before he was inducted into the Army, and his condition was not seriously aggravated by Army service, he was entitled to reinstatement in his former position of tacker in defendant's tannery.

The Director of Selective Service has taken the view that a veteran seeking reinstatement in his former position is not required to meet higher standards than existed in that position at the time it was vacated by him, nor even standards which the employer may now require of other employees in the same or similar positions. "If the position has been so changed in job content that it is beyond the veteran's skill, he is entitled to a job requiring skill comparable to that required by the position which he left at the time he left and equal in seniority, status, and pay to that which he vacated."[29] While a literal reading of the section might not result in this same conclusion, the peculiar background and purpose of Section 8 suggest that a reasonable construction is preferable to a literal one. If the employer has a job available which compares favorably with that whcih the veteran left, its duty to reinstate him in such position seems clear. It is doubtful, however, if even a reasonable construction of the statute could endorse the Director's further opinion that where the veteran could be retrained on the up-graded job to perform the new duties safely and efficiently within a reasonable period of time, he is entitled to be employed upon that job.[30] While a liberal construction of Section 8 in favor of the veteran is vastly preferable to a technical-wise interpretation, a loose construction which exceeds the limits of reasonableness should be avoided.[31]

V

". . . and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year. . . ."

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27. "When a veteran seeks reemployment, there is a strong presumption that he is qualified to perform the duties of the position he left to enter the armed forces since he performed those duties prior to that time." Handbook—Veterans' Assistance Program § 304.1.

28. 58 F. Supp. 857 (D. C., D. N. J. 1945).

29. Handbook—Veterans' Assistance Program § 304.2.

30. *Id.* at § 304.3 (b).

31. Tipper v. Northern Pacific Ry., — F. Supp. — (W. D. Wash. 1945), 17 LAB. REL. REP. 147, ". . . the Act . . . must be liberally construed, but such liberal construction of course should not be carried to the point that it does violence to the Act itself."

The requirement that the veteran apply to his employer within the prescribed ninety day period[32] following his discharge or release from hospitalization is mandatory. While no special form of application is stipulated, failure to give notice to the employer within the required time would presumably wipe out the veteran's reemployment rights under Section 8. It has been held by one District Court that a mere request to the employer for an immediate leave of absence upon the veteran's discharge from service does not constitute a request for immediate reemployment.[33] "Such a request amounts to nothing more than asking the employer to simultaneously reinstate the applicant and give him an immediate vacation," the effect of which would be to permit the applicant to extend the statutory limitation of time fixed by the Act.[34] It has therefore been held in such a case that the veteran had not sustained the burden of proof that he had applied for reemployment.

The effect of accepting interim employment upon the veteran's release from the armed forces was considered in part in the recent case of *Tipper v. Northern Pacific Ry.*[35] Plaintiff was refused reinstatement by a foreman of defendant when transferred from active to inactive duty by the Army, on the condition that he accept employment in an essential activity in the Bremerton Navy Yard. It was held that since such release from active duty for over-age entailed but a change in status and was not the equivalent of a discharge, the period of time required for application for reinstatement did not commence to run until final discharge from the Army. Such acceptance of employment elsewhere, the tenure of which exceeded a ninety day period following plaintiff's release from active duty, did not constitute a waiver of his reemployment rights.[36] On the other hand, another court has suggested the inequitable effect of permitting a veteran to accept other employment, when wrongfully denied reinstatement, and then to sue to recover from his former employer the compensation which he would have received if he had been reinstated, in addition to retaining what he earned on the second job:

"Where the veteran, notwithstanding the employer's refusal to restore him to his former position, is able to pursue his trade or profession and actually does so, it is the opinion of this court that, while the veteran may remain within the protection

32. The original time limit of 40 days was extended to 90 days by legislative amendment to the Selective Training and Service Act, effective December 8, 1944. No such amendment has extended the period of time for application required of members of the Merchant Marine.

33. Grasso v. Charles M. Crowhurst, 58 F. Supp. 857 (D. C., D. N. J. 1945).

34. *Id.* at 860.

35. — Fed. Supp. — (W. D. Wash. 1945), 17 LAB. REL. REP. 147.

36. The effect of this decision, if upheld, on the many officers and enlisted men who will transfer to inactive duty in the Reserve upon their release from active service is not clear. Unless some definite limitations are prescribed as to the time in which such employees must apply for reinstatement, this decision would suggest that the 90 day period for such employees might be extended indefinitely. In the subject case, the veteran was released from active service early in 1943 but was not finally discharged by the army until March 19, 1945, at which time his 90-day application period evidently commenced to run.

of the Act, his situation is not of the type which the Act is primarily intended to alleviate, and compensation should be determined accordingly."[37]

While a veteran may presumably waive his reemployment rights by failing to make timely application for reinstatement or by voluntarily quitting the job after reinstatement, such waiver must be proved by clear and positive evidence, with the burden of proving its validity upon the person claiming such waiver.[38] The Director of Selective Service has interpretated the above-quoted subdivision to preclude a mandatory obligation of reinstatement by the employer where the veteran voluntarily quit after being reemployed, even though the original ninety day period had not yet elapsed on the occasion of his second application.[39]

VI

". . . (B)[40] if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;"

No portion of Section 8 has been more sharply debated than the above paragraph. Seemingly innocuous on its face, it has been the target of a vast amount of controversy and recrimination, misunderstanding and conflicting opinion. Government agencies, unions, veterans' organizations, employers' groups, and others, without benefit of judicial opinion have loosed fusilades of dogmatic *dicta* concerning the interpretation of this paragraph until the picture is muddied with confusion and uncertainty. The reason for this articulate anxiety on the part of so many would appear to lie in the fact that economic interests of third parties are seriously threatened under this paragraph by the

37. Kay v. General Cable Corp., 59 F. Supp. 358 (D. C., D. N. J. 1945). In the ordinary case it is probable that the established rule of law that an employee whose employment contract has been wrongfully terminated should minimize resultant damages by seeking substantially equivalent employment elsewhere would prevail. Costigan v. Mohawk & Hudson R.R. Co., 2 Denio 609 (N. Y. 1846); Howson v. Mestayer, 14 Daly 83 (N. Y. 1886); Howard v. Daly, 61 N. Y. 362 (1875); Johnson v. Meeker, 96 N Y. 93, 97 (1884); Merrill v. Blanchard, 7 App. Div. 167, 40 N. Y. Supp. 48 (1st Dep't 1896), *aff'd without opinion,* 158 N. Y. 682, 52 N. E. 1125 (1899). The quoted dictum in the *Kay* case *supra,* suggests that the courts may take into consideration in computing damages compensation which a veteran, denied immediate reinstatement, earned elsewhere. Because of the statutory right to reemployment guaranteed to qualified veterans, and the unusual economic and social forces motivating such legislation, it is less certain that the courts will, or should, enforce the obligation inherent in the rule of avoidable consequences in the case of a veteran wrongfully denied reinstatement where he is not unreasonably dilatory or passive in pressing his application upon discharge from the services.

38. Tipper v. Northern Pacific Ry Co., — F. Supp. — (W. D. Wash. 1945), 17 LAB. REL. REP. 147.

39. Handbook—Veterans' Assistance Program § 301.5 (b).

40. Discussion of paragraph (A) of § 8 (b), dealing with the reemployment rights of federal employees generally is omitted.

reappearance of the veteran at his former place of employment. Paradoxically, while it would appear that a liberal construction of Section 8, *in its entirety,* would most conform to the intent of Congress to secure the veteran's job rights, a strictly literal construction of the above-quoted paragraph (B), divorced from its context, is required to sustain his preferred position. It is this conflict of liberal versus literal interpretation of the specific provisions of paragraph (B) wherein lies the heart of the present controversy. It is the contention of the Director of Selective Service that the mandate of Congress is clear and unequivocal. The qualified veteran is to be reinstated to "such position," meaning *to his old job,* without any conditions precedent not expressed in the statute. "Such position" does not mean his old job *providing* he has sufficient accrued seniority to take precedence over a non-veteran. As Selective Service stated its position in April, 1945:[41]

"The qualifications for reinstatement in his former position which the veteran must fulfill are clearly specified, but 'seniority' is not one of them; it appears only as one factor in measuring the position which may be given the veteran in lieu of his original one. . . . It is clear that the veteran does not receive 'super-seniority'; he is simply not subject to seniority as a condition precedent to his restoration to his old job. He secures restoration to his former position not *because of,* but *including* seniority."

To sustain this stand it is essential that the phrase "such position," as used in the Act, be interpreted as synonymous with actual employment—"a return to actual performance of work" as Selective Service terms it[42] and not just a rating on a seniority roster with work only when the veteran's number turns up favorably. As was stated in the court in *Kay v. General Cable Corp.*:[43]

"The purpose and intent of Congress in framing section 8 of the Selective Training and Service Act was, I think, twofold. It was designed to provide for the rehabilitation of the returning veteran so that he might be equipped to enter a highly competitive world of job finding without the handicap of a long absence from work, *as well as to provide for his financial stability for the period of at least one year following his discharge from service.*"[44]

Under the literal interpretation of paragraph (B), the interests of fellow employees and their collective bargaining agents are subordinated to the right of the veteran to enjoy financial stability for the year following his military discharge by a guarantee to him of actual work. If, upon his discharge, the veteran finds that the only job comparable to his own is occupied by a non-veteran, even one with greater seniority under a collective bargaining agreement or company plan, the veteran is nevertheless entitled to that job. He is entitled to his old position or, where such position no longer exists, to a position of like seniority, status, and pay, and the Act does not make such right

41. Selective Service Publication, April, 1945; 1 Prentice-Hall Labor Service 2195; Release S-64, National Headquarters, Selective Service System, May 9, 1945.

42. *Ibid.*

43. 59 F. Supp. 358, 360 (D. C., D. N. J. 1945).

44. Italics inserted.

contingent upon conditions not enumerated therein. The consequences to third persons should not derogate from the benefits which Congress intended to secure to the veteran. Selective Service has summarized this proposition succinctly:

"The only conditions for reinstatement that a veteran may be required to meet are those conditions which are specifically enumerated in the law. Union membership or other conditions not enumerated in the law may not, therefore, be required as a prerequisite to his reinstatement."[45]

The reasoning of those who deny this literal interpretation of paragraph (B) appears to result from an endeavor to read into the phrase "shall restore such person to such position" the qualifications attached to the *alternative* which is provided for in the event the original job no longer exists. It would seem that paragraph (B) states, in effect, that the veteran is to be restored to his former job with no qualifications or conditions attached thereto, *or, in the alternative* to a job which conforms to the seniority, status and pay of the veteran as would have existed had his term of employment not been broken. The alternative, being a substitute which allows an expansion of the veteran's reemployment rights beyond the original position to which he was hired, would appear to offer a means of permitting the employer when operating under such alternative to abide by the mandate of the statute to give reemployment to the veteran and at the same time respect the seniority rights of others. It further seems only fair that any existing job which is identical to that vacated by the veteran upon his induction should be presumed to be his original job upon reinstatement.

The irreconcilable conflict which the literal interpretation of paragraph (B) encounters with the so-called "seniority roster" line of reasoning is manifest. Prior to the first judicial decision in August, 1945, dealing with seniority as a condition of employment,[46] the field of discussion was strewn with *dicta* and governmental pronouncements of varying degrees of usefulness. In May, 1945, the Solicitor of the Department of Labor released a statement construing Section 8 as making the veteran's right to reemployment and subsequent upgrading and promotion, (as well as demotion and lay-off) absolutely conditional upon his relative place on the seniority list.[47] The right of a veteran to replace a non-veteran who possesses greater seniority and occupies the former's old job has been specifically denied in an arbitration of a labor dispute involving this issue.[48] The former Attorney-General of the United States made it clear

45. Handbook—Veterans' Assistance Program § 305.3.

46. Fishgold v. Sullivan Dry Dock and Repair Corp., 62 F. Supp. 25 (E. D. N. Y. 1945).

47. Memorandum from Douglas B. Maggs, Solicitor of the United States Department of Labor, to Howard T. Colvin, Acting Director of the United States Conciliation Service, May 8, 1945.

48. *In re* Timken Roller Bearing Co. and United Steelworkers of America, Local 1123 (C.I.O.), — F. Supp. — (W. D. Wash. 1945), 16 LAB. REL. REP. 158. The same company has recently requested a declaratory judgment from the District Court for Northern Ohio to determine its responsibility in reinstating a veteran to his former job regardless of

that the Department of Justice would represent veterans claiming reemployment regardless of seniority rights, but that

"since the 'superseniority' interpretation is not free from doubt under the Act, the Department will expect to present the issue to the Courts with full candor. Any briefs submitted will disclose the consideration and the legislative history both pro and con. . . . Any veteran seeking representation in asserting a superseniority claim should be informed of the fact that his case will be presented in this manner, so that he can retain private counsel should he prefer to do so."[49]

The first judicial interpretation of the seniority issue was rendered in August, 1945, in *Fishgold v. Sullivan Dry Dock and Repair Corp.*[50] Plaintiff, a first-class welder, was reinstated by defendant to his permanent job upon release from the armed forces but was immediately laid off for nine days while non-veteran employees of the same status and pay, but with greater seniority, remained on the job. Refusing to find that such a lay-off was not tantamount to a discharge under Section 8, the court held that plaintiff was entitled to recover his regular compensation for those days during which he was not permitted to work. In finding in favor of the veteran, Judge Abruzzo of the federal court stated in part:

"I am convinced that Congress had in mind that a returning veteran should have the opportunity of having one year to avoid open competition, due to the fact that for two, three or four years he was away.

"I am not going into the equity of the situation; I am not concerned with whom he has to displace. . . . There is no issue here as to the collective bargaining act, but in passing I might state that the collective bargaining act before me conforms exactly, as far as I can see, to the language of the Selective Service Act.

"I believe that Congress intended that during the period of one year, any day that there was work, between veterans and non-veterans the veteran was entitled to the preference and he was not to work only if the defendant had no work or had to choose between World War veterans of World War II."[51]

The reading into the statute of the rights which veterans of World War II may have over other veterans of World War II is a significant addition to

seniority rights provided for in its union contract. — F. Supp. — (W. D. Wash. 1945), 17 LAB. REL. REP. 183. A more recent arbitration decision held that a non-veteran with greater seniority had preference over a veteran in choice of shifts and that the Selective Training and Service Act did not guarantee such "incidents" to the veterans' job as the right to work on the particular shift which he left upon induction. *In re* Firestone Tire and Rubber Co. and United Rubber Workers of America, Local 100 (C.I.O.), — F. Supp. — (W. D. Wash. 1945), 17 LAB. REL. REP. 77. This same issue has been raised recently in a suit filed by a veteran to recover pay for time allegedly lost during a two-weeks' period following his honorable discharge and application for reinstatement when the company offered him a job identical with his old one, paying the same rate of compensation but on a shift other than the shift on which he was working when inducted. Grubbs v. Ingalls Iron Works Co., — F. Supp. — (W. D. Ala. 1945), 17 LAB. REL. REP. 280.

49. Department of Justice Circular No 3851, Supplement No 3, May 10, 1945.

50. 62 F. Supp. 25 (E. D. N. Y. 1945).

51. *Id.* at 26.

the liberal construction of the statute. It suggests an inconsistent, although equitable, digression from the strict interpretation of paragraph (B). Significant as the *Fishgold* decision may be, the ultimate disposition of the issue of seniority rights under paragraph (B), as well as its less frictional components of like "status and pay," must be yet determined by the appellate courts. Despite the assertions of those who would find implied conditions precedent to reemployment in paragraph (B) the only apparent condition lies in the text of the provision itself: ". . . unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so."

The constitutionality of this latter provision was challenged in one of the first court tests in which Section 8 was involved. In *Hall v. Union Light, Heat & Power Co.*[52] plaintiff sought to recover back pay for the three months following his honorable discharge during which he was denied reemployment by defendant. Defendant employer admitted the facts substantially as charged but based its defense in part on the claim that paragraph (B) was repugnant to the Fifth and Sixth Amendments to the Constitution guaranteeing due process of law and that persons accused of crime shall be adequately informed of the nature of the accusation; that the terms "impossible" and "unreasonable" were so vague and uncertain that the section could not reasonably be complied with; that what constitutes a violation, whether wilful or inadvertent, is not specifically defined and therefore must be determined by the courts. Citing the familiar rule that every reasonable doubt should be resolved in favor of the constitutionality of a statute and that it should not be held invalid unless its violation of the Constitution is clear, complete, and unmistakable,[53] the court determined that the terms "impossible" and "unreasonable" were not so vague and obscure as to leave an employer in doubt as to his obligations under the statute. Pointing to the effect which such a piece of legislation has upon the morale of the military forces in a time of grave emergency, the court declared that it would be an unwarranted usurpation of the legislative function of providing for the common defense to strike it down because it necessarily employs terms of a more or less indefinite and negative meaning, especially where the statute in question is not a criminal statute.[54] In this latter respect the court distinguished *United States v. L. Cohen Grocery Co.*[55] in which the United States Supreme Court held unconstitutional a statute employing the terms "unjust and unreasonable" in the setting of rates on the ground that it involved a criminal prosecution. In disposing of the holding in the *Cohen*

52. 53 F. Supp. 817 (E. D. Ky. 1944).

53. Fletcher v. Peck, 6 Cranch. 87 (U. S. 1810); Nebbia v. New York, 291 U. S. 502 (1934).

54. Hall v. Union Light, Heat & Power Co., 53 F. Supp. 817, 819 (E. D. Ky. 1944). The court cited with approval United States v. Ragen, 313 U. S. 512, 524 (1942), in which it was said: "On no construction can the statutory provision here involved become a trap for those who act in good faith. A mind intent upon wilful evasion is inconsistent with surprised innocence."

55. 255 U. S. 81 (1921).

decision the court in the present case[56] emphasized that there is a vast difference between a person answering an indictment which makes the general charge that he has been guilty of an unjust and unreasonable act, and a civil action in which the question for determination is merely whether or not an employer has had such a change in his or its circumstances as to make it impossible or unreasonable to reemploy a veteran.[57]

Mere inconvenience to an employer, or undesirability of a returning veteran as an employee, does not constitute such a change of the employer's circumstances as to make the veteran's reinstatement "impossible or unreasonable." In *Kay v. General Cable Corp.*,[58] plaintiff was a physician who, prior to his entry into the armed forces, was regularly employed as a medical director by defendant and was denied reinstatement upon his release from military service. Plaintiff, in addition to his former duties as company physician, had also been engaged as physician for an employees' Health Association in defendant's plant to give medical treatment for ills not connected with compensable injuries, which were covered by his regular duties as medical director to defendant. The employees' Health Association having refused to reengage plaintiff in preference to the person who had replaced him, defendant employer contended that it would permit greater efficiency and also avoid loss of the workers' time if the same physician were engaged by the company and the Health Association. Reinstatement of plaintiff would presumably necessitate retention of another physician for the Health Association. Denying that such a set of facts constituted a change that would make it unreasonable for defendant to reinstate plaintiff, the Circuit Court of Appeals reversed a judgment of the District Court dismissing the complaint and remanded the case for appropriate action, with the observation:

"Accepting the defendant's contention that there would be some loss of efficiency and possibly some additional expense involved, more than that is needed to justify refusal to reinstate a person within the protection of the Act. In most cases it is possible to give some reason for the refusal. 'Unreasonable' means more than inconvenient or undesirable. . . . The Act intends that the employee should be restored to his position even though he has been temporarily replaced by a substitute who has been able, either by greater efficiency or a more acceptable personality, to make it desirable for the employer to make the change a permanent one."[59]

The court in the *Kay* case specifically declined to consider whether the reinstatement of a veteran would so materially affect his relations with fellow employees or other third parties as to constitute a change in the employer's circumstances within the meaning of Section 8. The Director of Selective Service has declared that the proviso "unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so" applies only to the *employer*. The consequences to third parties not being provided for,

56. Hall v. Union Light, Heat & Power Co., 53 F. Supp. 817 (E. D. Ky. 1944).
57. *Id.* at 820.
58. 144 F. (2d) 653 (C. C. A. 3d, 1944), *rev'g*, 59 F. Supp. 358 (D. C., D. N. J. 1945).
59. *Id.* at 655.

the "impossible and unreasonable" provision should not be applied to cover the effect of the veteran's restoration on third persons, such as other employees.[60]

The opinion of the Director of Selective Service would appear to conform to the purposes of the Act. Too frequently the point is overlooked that Section 8 of the Selective Training and Service Act was enacted to benefit veterans only, and not fellow-employees, labor unions, or management. Its salutary provisions should be confined to the benefit of veterans. If further legislation is desired to benefit non-veterans and their collective bargaining agents, the parliamentary facilities are available. It is certain that the effectiveness of Section 8 should not be destroyed by reading into it the demands of persons and organizations not covered by the Act.

VII

"(c) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay."

The language of the subdivision clearly distinguishes this paragraph from the two preceding paragraphs. It is only the *sense* of Congress that the states conform to the requirements of reemployment laid down for private employers and the federal government. Congress has not attempted to lay mandatory restrictions upon a purely administrative function of the states in their relationship with their own employees, and whether or not a state chooses to conform to the provisions of Section 8 appears to rest within the state's discretion.[61] It is not extravagant to suggest that a more positive directive to the states with respect to their own employees might have encountered a strenuous objection that the Constitutional provision guaranteeing the reserved powers of the states was being violated.[62]

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60. Handbook—Veterans' Assistance Program § 305.2. However, the Director would allow priority to other veterans of World War II who, before leaving for entry in the armed forces, occupied the same job assignment prior to the time at which the veteran already restored had been placed in it. § 306.3 (c).

61. For a state court decision so construing the Act, see McLaughlin v. Retherford, 184 S. W. (2d) 461 (1944).

62. "The States, resting upon their original basis of sovereignty, subject only to the exceptions stated, exercise their powers over everything connected with their social and internal condition. A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power." Thurlow v. Commonwealth, 5 How. 504, 588 (U. S. 1847). See also, 1 WILLOUGHBY, CONSTITUTIONAL LAW (2d ed. 1929) § 131.

VIII

"(c) Any person who is restored to a position in accordance with the provisions of Paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

The provisions of this subsection have not been examined at length by the courts, although it must be anticipated that disputes as to certain of its terms cannot be avoided. The veteran is considered on furlough or leave of absence from his employment during his military service, a fact which suggests that his tenure of employment has never been terminated; rather his active performance on the job has been suspended until such time as he is qualified to apply, and does so, for reinstatement to active employment. Thus, the term "reemployment" would not seem technically correct since it connotes re-hiring. This interpretation of the employee's status while in the armed forces has been sustained in a decision rendered by the New York Surrogate's Court in In re *Walker's Estate.*[63] Testatrix had provided for bequests to all persons who should be in her employ at the time of her death. An employee of the testatrix was inducted into the armed forces, and subsequently died in action following testatrix's death. The court held that the employee's administrator was entitled to recover his share under the will on the grounds that upon his induction he continued in testatrix's employment although on furlough under Section 8 (c) of the Act.

The term "shall be restored without loss of seniority" has been interpreted by the Director of Selective Service as an accumulation of seniority rights during his period of active military service. The veteran is entitled to have added to his length of service with the employer the total time spent in military service and to receive any additional benefits or advantages to which the total length of service, including the time spent in military service, entitles him.[64] Such an interpretation of subsection (c) appears to be the most equitable to the veteran in competing with those who remained behind, although it disregards the possibility that his seniority might have been terminated by a discharge or resignation had he not been inducted into the armed services. Participation in insurance and other benefits offered by the employer which presumably do not accrue solely by length of service must depend upon the established rules and practices of the employer relating to employees on leave of absence or furlough at the time of entry into the armed forces. However,

63. — Misc. —, 53 N. Y. S. (2d) 106 (Surr. Ct. 1944).

64. Handbook—Veterans' Assistance Program § 306.7.

Selective Service has suggested that a reinstated veteran is entitled as a matter of right to any wage increases accruing within his rate range during his absence and based solely upon length of service.[65] Similarly, General Counsel to the National War Labor Board in November, 1944, issued an opinion that where a company had an automatic wage progression plan based on length of service, a returning veteran should be reemployed at the level in the schedule at which he would have been entitled if there had been no break in his service with the company. Such veteran is therefore deemed to be entitled to any length of service increases which the job would have carried with it during his military service, exclusive of course, of promotions from one job or grade to another and *bona fide* apprentice or trainee progressions which are governed by considerations of skill and ability as well as length of service.[66]

While such a construction favors the returning veteran by placing him at the top of his rate range if he has served the time required to progress to such maximum, its application appears to defeat the common expectation under an automatic wage progression plan that increased productivity will accompany increased skill and ability resulting from length of performance on the job. It may also be anticipated that the rate ranges for job classifications filled by returning veterans will be unduly top-heavy under this construction, since in most cases those employees must be placed at the maximum of their range upon reinstatement. The result of such a situation might be mitigated where a company's employees in the armed forces do not form an unduly large proportion of the company's post-war personnel. Participation in benefits accruing from vacation and holiday plans, sick leave, if any, and insurance benefits would appear to be determined by the employer's customs or agreement relating to employees on furlough or leave of absence in effect at the time of induction.[67]

What constitutes "cause" justifying a reemployed veteran's discharge within one year after his actual restoration to his former job is necessarily a question of fact which in many instances must depend upon the individual case. The act should not be construed to permit discharge for refusal of the veteran to

65. *Id.* at § 306.9.

66. National War Labor Board Releases B-1834, issued November 16, 1944, and B-1834-a, issued December 10, 1944. While it should be remembered that such an opinion is confined to the Board's jurisdiction as determined by law, the foregoing rule was subsequently directed by the Board to be applied in a disputed case involving this issue. *In re* Marmon-Harrington Company and United Automobile, Aircraft, and Agricultural Implement Workers of America, Local No. 226 (C.I.O.), Case No. 111-6558-D, January 30, 1945, N. W. L. B. Release B-1834-b.

67. In Murphy v. Chrysler Corp., 306 Mich. 610, 11 N. W. (2d) 261 (1943), it was held that the personal representatives of an employee who had voluntarily quit five days before his scheduled induction and died one day prior thereto were not entitled to recover the proceeds of a life insurance policy maintained by the decedent under a group insurance plan during his employment. Since he was deemed to have severed his employment relationship in the day he last clocked out, he was not on a mere leave of absence or furlough under § 8 (c) even though he quit for the express purpose of awaiting imminent induction, and therefore his insurance policy, which was conditional upon continuous employment, expired at the date of separation.

join a union where the company has agreed to a closed or union shop during his absence, nor does it seem clear that he should be required to join as a condition of reemployment even where a closed or union shop existed in the employer's plant at the time of the veteran's induction. Since union membership is not stipulated as a condition *precedent* to reinstatement, it would be unjust and illogical to require the veteran to be discharged *subsequent* to reinstatement *within the one-year period* for failure to abide by a condition of union membership, especially where Congress did not express any intention to create such a condition. To the contention that a closed or union shop existing at the time of the employee's induction was included in his employment contract and therefore constitutes a part of "such position" to which he must return, it should be pointed out that if applied consistently such a proposition would subordinate the reemployment rights of the veteran to the seniority plan which formed a part of the contractual relationship upon his induction. Such a condition, as already noted, cannot be justified. On the other hand it may be contended that reading into the reemployment provisions a condition such as seniority would completely frustrate the evident intent of Congress to assure the veteran actual work; whereas no such result would necessarily follow from the implication of other conditions of reemployment, such as union membership, to which the veteran was actually subject at the time he entered the military service. Retention of his job is as important to the veteran's adjustment in a post war economy as his reinstatement, and neither right should be undermined by unwritten qualifications. Discharge for cause should be interpreted in the sense that it is commonly understood by the worker and his employer—as a proper disciplinary or remedial prerogative of management for an infraction of its rules or inability of the employee to perform his job.[68] However, where a veteran, prior to his entry into the armed forces, signed an agreement with his employer providing that the employment relationship could be cancelled by either party upon six months' notice, its termination by the employer while the employee was still in service was held valid.[69]

IX

"(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such

68. In Fishgold v. Sullivan Dry Dock & Repair Corp., 62 F. Supp. 25 (E. D. N. Y. 1945), the court construed a lay-off for lack of work as the equivalent of a discharge without cause.

69. Wright v. Weaver Bros. Inc., 56 F. Supp. 595 (D. C., D. Md. 1944). The case was decided under the Army Reserve and Retired Personnel Law of 1940, 54 STAT. 858, 50 U. S. C. A. 403, the reemployment provisions of which are identical to those of the Selective Training and Service Act.

provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions; Provided, That no fees or court costs shall be taxed against the person so applying for such benefits."

The procedural requirements of Section 8 have undergone a somewhat closer examination by the courts than have some of its other provisions. The United States district attorney for the district in which the employer maintains his place of business is vested with the duty of serving as counsel for the veteran in any case in which the applicant appears to be covered by Section 8 and seeks his assistance. The responsibility of the United States Attorney in initially deciding whether the applicant is so covered should not be undertaken lightly, since his judgment is incidental to the court's function of finally determining the applicant's coverage and rights appertaining thereto. It therefore might seem regrettable that the former United States Attorney General saw fit to publicize the fact that the duty of United States district attorneys generally was "not only to represent the veteran, as provided by statute, but acting as an officer of the court, to present to the court whatever may be useful in helping the court arrive at a proper construction of the statute."[70] Whether or not this directive be modified by the present Attorney General, the impression remains that the counsel whom Congress has designated to represent the veteran might maintain such impartiality as to defeat the legislative purpose in providing the veteran—particularly the needy veteran—with adequate legal representation. No uncertainty of counsel's ultimate duty should confront the veteran who seeks his assistance.

Where it appears that the employer contemplates violating the reemployment rights of an employee not yet released from military service, it has been held that an action by such employee for a declaratory judgment confirming his right to reemployment upon his honorable discharge, if otherwise qualified, was not "premature."[71]

One of the defenses raised in *Hall v. Union Light, Heat and Power Company*[72] was that the court lacked jurisdiction in that the action was one merely

70. Dept. of Justice Circular No. 3851, Supplement No. 3, May 10, 1945.

71. See note 69, *supra*.

72. 53 F. Supp. 817 (E. D. Ky. 1944).

to recover back pay for a period during which the company wrongfully had refused to reinstate plaintiff. It was argued that since subsection (e) provides for the proper district court "to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages suffered . . .", a suit merely to recover back wages after reinstatement could not be properly brought. The court declined to accept a narrow construction of the word "incident" as implying a relationship to some superior thing—*i.e.*, an action to recover the actual position or employment. A denial of the veteran's right to prosecute, based on such a technicality, would be to place in the hands of a dilatory employer the means through which it could defeat the whole purpose of the Act and to make a mockery of what the Congress had in mind in its passage. The court observed that to confine the right to recover wages only to the cases in which the veteran is required to go into court to recover his job is making a distinction without a difference.[73] The court in the *Hall* case, in denying a motion to dismiss the complaint, found no objection to allowing recovery of back wages from the date of application for reemployment. A contrary ruling appears in *Kay v. General Cable Corp.*[74] in a decision of the District Court after its previous judgment dismissing the complaint had been reversed by the Circuit Court of Appeals and remanded for appropriate action.[75] The original complaint had been filed some six months after plaintiff was denied reinstatement by defendant. In accordance with the mandate of the Circuit Court, an *ex parte* order was entered providing for plaintiff's reinstatement and further ordering defendant to compensate him at his regular rate of pay for the period from the date of application to the date of restoration to plaintiff's former position. Defendant moved to vacate this order and asked for entry of an order directing it to pay plaintiff only for the loss of one year's wages. The previous order was vacated and the defendant directed to pay plaintiff only for the period since the institution of the original action.[76] Basis for the court's finding appears to lie in the fact that the veteran waited six months after he was refused reinstatement before commencing an action under Section 8. The provisions of that section give him immediate relief in the proper district court upon his employer's refusal to reemploy him, and a delay of six months following such refusal was held to bar recourse against the employer for compensation during such extended period.[77]

While such a rule doubtless encourages an expeditious filing of complaints

73. *Id.* at 818.

74. 59 F. Supp. 358 (D. C., D. N. J. 1945).

75. Kay v. General Cable Corp., 144 F. (2d) 653 (C. C. A. 3d, 1944).

76. The court further held that plaintiff was entitled to such compensation until the time when the District Court rendered its opinion adverse to him and favorable to the employer. For the period during which the decision favorable to the employer remained outstanding and unreversed, no compensation need be paid. For the date of the Circuit Court opinion reversing the decision of the District Court until plaintiff was restored to his position, the regular rate of compensation was to be resumed.

77. Kay v. General Cable Corp., 59 F. Supp. 358, 360 (D. C., D. N. J. 1945).

by veterans denied reinstatement, it appears to permit abuse by an unscrupulous employer who might desire to postpone reinstatement by prolonging negotiations with the former employee and lulling him with false promises. It is submitted that a more reasonable rule might be to permit recovery of back wages from the date of application unless the employee is unable to offer a satisfactory reason for delaying commencement of the suit beyond a reasonable time after such application. If his reason does not satisfy the court, then the date from which compensation should be paid would be the date of commencement of the action.

One further step in interpreting Section 8 (e) was made in *Salzman v. London Coat of Boston, Inc.*,[78] in which it was held that where the unsuccessful plaintiff had not availed himself of the provisions of subsection (e) by filing his suit through the office of the United States Attorney, he was not entitled to the benefit of the provision that "no fees or court costs shall be taxed against the person so applying for such benefits."

X

Much remains to be done by the courts in establishing the meaning and proper application of Section 8. Despite the generally well-reasoned guides issued by the Director of Selective Service to his field representatives, and the gratuitous opinions, observations, and communiques released by various government agencies, labor unions, employer's associations, and others, the ultimate interpretation must rest with the judiciary. The proposals for so-called clarifying legislation do not seem to be well-founded. The language of Section 8, while it must necessarily be broad in order to cover a variety of situations, is reasonably clear in its purpose to assure employment to the qualified veteran. Its provisions should not be misapplied in order to assure employment for non-veterans who may be displaced as a result of the veteran's reinstatement. If additional legislation is required to assist displaced workers in obtaining employment, it should be enacted as a supplement to, and not at the expense of, the reemployment provisions of Section 8. As veterans reemployment legislation, Section 8, as it now reads, appears to be workable, if properly applied.

78. — F. Supp. — (W. D. Wash 1945), 17 LAB. REL. REP. 149.